No. 184

Supreme Court of the United States

OCTOBER TERM, 1905.

THE TRAVELERS INSURANCE COMPANY OF HARTFORD, CONNECTICUT, - Plaintiff in Error,

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY.

PETITION FOR A RE-HEARING.

The said plaintiff in error comes now, and respectfully petitions this Honorable Court for a rehearing of said cause, for the following reasons, *to-wit:*

1. Because the license granted July 1, 1904, did not expire July 1, 1905, as inferred by the court, the license having been renewed July 1, 1905, for another year, unless sooner revoked, in order to prevent injustice to plaintiff in error *pendente lite;* as appears per affidavit of Edmund F. Trabue, the certificate of authority issued July 1, 1905, and the letter of the Insurance Commissioner to said Trabue dated March 12, 1906, hereto attached.

2. Because *Section 631, Kentucky Statutes*, does not limit the life of the authority to do business to the period of one year.

3. Because the case was prosecuted diligently, involved a live question when decided by the State court, was promptly brought to this court and motion to advance seasonably made

in time, if advanced, to have enabled this court to decide the case before July 1, 1905.

And your petitioner prays, therefore, that an order may be made for a rehearing of the argument in this case on a day to be appointed by this court, and at the present term, and upon such points as the court may direct.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel.

We hereby certify that in our opinion the foregoing petition is well founded in point of law.

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel for Plaintiff in Error.

ARGUMENT.

I.

On the question of expiration of this court's jurisdiction it has always received evidence *dehors* the record. In *Dakota Co.*, v. *Glidden*, 113 U. S., 225, this court said:

> "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceeding in a case before them on error or appeal."

Also, *p. 226:*

> "It is by reason of the necessity of the case that the evidence by which such matters are brought to the attention of the court must be that not found in the transcript of the original case, because it occurred since that record was made up." &c., &c.

In *Kimball* v. *Kimball*, 174 U. S., 162, this court said:

> "From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its right and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence. *Dakota County* v. *Glidden*, 113 U. S., 222, 225, 226 (28: 981, 982); *Mills* v. *Green*, above cited."

In *Jones* v. *Montague*, 194 U. S., 147, 153 (48 L. Ed., 913), the facts subsequently occurring were proved *dehors* the record.

Clearly, therefore, the principle allowing the expiration of jurisdiction to be proved *dehors*, likewise suffices to permit an inference of the probability of the expiration of such jurisdiction to be contradicted *dehors* the record.

Inasmuch as plaintiff's authority to transact business in

Kentucky still exists, the question argued herein as to the constitutionality of *Section 631* can not be a moot question. The action of the commissioner was in *uberrima fide*, he being one of those unusually excellent officials, ready not only to do his duty, but eager to avoid injustice even to an antagonist. Recognizing the great and unnecessary loss to plaintiff to result from a hasty cancellation of its authority to do business, he even renewed that authority July 1, 1905, virtually *pendente lite*, upon the understanding that it would be promptly cancelled if this court held the Kentucky Statutes (*Section 631*) constitutional.

Accordingly, the question raised for the first time by this court was not made by defendant's counsel upon the oral argument. Both litigants realized that it was a live question, and a vital question. Defendant was not prejudiced by renewing the authority July 1, 1905, because he could cancel it immediately if this court's decision were in his favor, and plaintiff was greatly benefited by the opportunity to contest the validity of the statute without the penalty of doing so at the peril of the destruction of its business in Kentucky.

II.

Section 631, Kentucky Statutes, does not limit the period of time for which the authority is granted, but *e contra Section 4226* (see appendix) provides payment of an *annual* tax, implying that the authority is to be perpetual. The commissioner seems to have adopted the habit of limiting the authority to one year's duration and of renewing it annually, possibly because *Section 633* requires him to renew the license to the company's agents annually. Whatever, however, might have been the origin of the habit is immaterial, for the statute makes no provision for such action. A company generally has agents in Kentucky, but might transact its business without an agent in

Kentucky, *e. g.*, by correspondence. Although, therefore, the commissioner granted the authority to plaintiff to do business for one year, he also renewed that authority so that it continued from the time of the original grant, and still continues.

III.

The general rule announced by this court is that where a controversy in a case pending in this court has become purely a moot controversy without the fault of defendant in error, the appeal will be dismissed, but in the cases wherein this court has announced the rule, it appears that the question has either become a purely moot question before the case came here, or no motion to advance was made. The emphasis by this court of the absence of the motion to advance (*Tennessee* v. *Condon*, 189 U. S., 67; 47:710), indicates that this court appreciates the injustice which would result if the rule were applied to a case prosecuted vigorously by plaintiff in error and which had reached this court in ample time for decision during the life of the controversy, but had died through no delay attributable to the parties to the litigation. We submit that this court will, when it ascertains that the ordinary application of its usual rules would work an injustice which could be prevented, adjudge an exception to such rules. When, therefore, a case comes here in time for decision, and *a motion to advance is made*, and the case is one for advancement (a fact adjudicated concerning this case), we submit that the case is not one for the application of the rule on dismissal of moot questions.

In all the cases cited in the opinion, and in the other cases which this court has decided upon the same point, either the question involved had become purely a moot question before the case reached this court or this court emphasized the fact that there was no motion to advance.

Dakota, &c. v. *Glidden*, 113 U. S., 225 (28:981).
Mills v. *Green*, 159 U. S., 651 (40:293).
Kimball v. *Kimball*, 174 U. S., 158 (43:932).
Codlin v. *Kohlhausen*, 181 U. S., 151 (45:793).
Tennessee v. *Condon*, 189 U. S., 64 (47:709).
Am. Book Co. v. *Kansas*, 193 U. S., 49 (48:613).
Jones v. *Montague*, 194 U. S., 147, 153 (48:913).
Selden v. *Same*, 194 U. S., 153 (48:915).

In *Tennessee* v. *Condon*, a case of hardship to plaintiff in error might have resulted from the dismissal had a motion to advance been made and the case been proper for advancement, for the case was docketed here December 10, 1901, and no motion to advance being made, was reached for argument March 12, 1903 (see *p.* 67). It was meanwhile that the question became a moot question as to some of the parties.

Respectfully submitted,

JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel

APPENDIX.

Kentucky Statutes, Section 4226.—Every life insurance company, other than fraternal assessment life insurance companies, not organized under the laws of this State, but doing business therein, shall on the first day of July in each year, or within thirty days thereafter, return to the Auditor of Public Accounts, for deposit in the Insurance Department, a statement under oath of all premiums receipted for on the face of the policy for original insurance and all renewal premiums received in cash or otherwise in this State, or out of this State, on business done in this State during the year ending the thirtieth day of June last preceding, or since the last returns were made and shall at the same time pay into the State treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained.

Every life insurance company not organized under the laws of this State, but doing business therein on what is known as the industrial insurance plan, whereby weekly premiums are collected, shall at the same time make a return to the Auditor of Public Accounts for deposit in the Insurance Department, a statement under oath of all premiums received on insurance written exclusively on the industrial plan, and shall at the same time pay into the State treasury a tax of two dollars upon each one hundred dollars of said premiums as ascertained.

Any insurance company mentioned in this section doing insurance business other than on the industrial plan, shall make separate reports and pay into the State treasury the taxes due thereon under each report.

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Office Supreme Court U. S.
FILED
MAR 24 1905
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 829. 184.

THE TRAVELER'S INSURANCE COMPANY
OF HARTFORD, CONNECTICUT, - *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER
OF THE STATE OF KENTUCKY, *Defendant in Error.*

MOTION TO ADVANCE.

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

BRIEF STATEMENT OF FACTS.

The plaintiff in error is a foreign life and accident insurance company, doing business in Kentucky under a license issued by the insurance commissioner. Upon being sued in a State court, the company removed the case to a Federal court, on the ground of diversity of citizenship.

Thereupon, the commissioner was about to cancel the license, when the company brought this action in the State Court—Jefferson Circuit—to enjoin the threatened cancellation. Judgment resulted in favor of the commissioner, sustaining his right to cancel the license. The

petition was, therefore, dismissed. This judgment, on appeal, was affirmed by the Kentucky Court of Appeals, the highest court of the State.

The reasons inducing the defendant in error to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as well as important to the numerous insurance companies doing business in the State.

According to reports in the Insurance Bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind.

LEGAL QUESTIONS.

The contention of the plaintiff in error, as shown by its petition below, to which a demurrer was sustained, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a Federal court, and under authority of which the Commissioner was about to cancel its license, is

repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

Wherefore, he respectfully prays that this case be assigned to as early a day upon the docket as may be practicable.

J. H. HAZELRIGG,
Counsel for Defendant in Error.

The plaintiff in error, the Traveler's Insurance Company of Hartford, Connecticut, concurs in the request and motion of the defendant in error to advance this case.

EDMUND F. TRABUE,
Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 539.

THE TRAVELER'S INSURANCE COMPANY
OF HARTFORD, CONNECTICUT . . *Plaintiff in Error.*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER
OF THE STATE OF KENTUCKY, . *Defendant in Error.*

NOTICE.

Notice is hereby given that Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, defendant in error in the above styled cause, will, on Monday, the 3rd day of April, 1905, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington, D. C.

J. H. HAZELRIGG,

Counsel for Henry R. Prewitt, Insurance Commissioner for the State of Kentucky.

The foregoing notice is hereby accepted and a copy of the motion is hereby acknowledged, this 20th day of March, 1905.

THE TRAVELER'S INSURANCE CO.
OF HARTFORD, CONNECTICUT,
By EDMUND F. TRABUE,
Counsel.

FILE COPY.

Supreme Court U. S.
FILED
NOV 24 1905
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 184.

THE TRAVELERS INSURANCE COMPANY, OF HARTFORD, CONNECTICUT, - - *Plaintiff in Error,*

v.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY,

Defendant in Error.

MOTION AND STIPULATION TO ADVANCE.

WHEREAS, the transcript in this case was printed as *No. 539, October Term, 1904,* and at the time when it was filed, there was also filed the transcript in *Security Mutual Life Insurance Company, Plaintiff, v. Henry R. Prewitt, Insurance Commissioner of Kentucky, Defendant, No. 530, October Term, 1904,* and motion to advance both cases made by defendant, Prewitt, and overruled by this court *without prejudice;*

And Whereas, afterwards, *to wit*, at the present term of this court said case of *Security Mutual, etc., Co. v. said Prewitt is No. 178* and this case is *No. 184*, and the motion to advance for argument has been renewed, and by this court sustained in said case *No. 178, Security Mutual, etc., Co. v. Prewitt*, and said case set for hearing, January 2, A. D. 1906, but by oversight of said Prewitt, Commissioner, the motion was not renewed in said case *No. 184, Travelers Insurance Co. v. Prewitt, Commissioner*, although said Prewitt intended to renew both motions;

And Whereas, the said cases were heard together by the two divisions in which they were respectively pending, of the Jefferson Circuit Court, and heard together upon appeal, in the Kentucky Court of Appeals which court rendered only one opinion covering both cases, and the said cases ought to be heard together in this court, as they involve like questions; accordingly, it is stipulated between plaintiff and defendant in error, that this case be advanced and heard January 2, A. D. 1906, as one case, with the aforesaid case *No. 178, Security Mutual, etc., Co. v. Henry R. Prewitt, Commissioner.* And both plaintiff and defendant in error move the court accordingly.

Said case *No. 178* was advanced upon motion therefor, as follows:

"MOTION TO ADVANCE.

"The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

"BRIEF STATEMENT OF FACTS.

"A motion to advance this case was made late in the last term (April, 1905), and was denied "*without prejudice.*" Accordingly, it is now renewed.

"The plaintiff in error is a foreign life insurance company, doing business in Kentucky under a license issued by the Insurance Commissioner (Record, 2, 3). Upon being sued in a State court, the company removed the case to the Federal court on the ground of a diversity of citizenship (Rec. 3).

"Thereupon the Commissioner canceled the license (Rec. 4); and the company brought this action in the State court—Jefferson Circuit—to compel the Insurance Commissioner to restore its license, and the lower court granted the relief upon the ground that the Kentucky statute directing such cancellation was void, as in conflict with the Federal Constitution (Rec. 8-12). The Court of Appeals of Kentucky reversed the lower court, and directed that the petition be dismissed (Rec. 14).

"The reasons inducing the Insurance Commissioner, defendant in error, to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as

well as important to numerous insurance companies doing business in the State.

"According to reports in the insurance bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind; and under the statute and the decision herein of the highest court in Kentucky, it is the duty of the defendant in error to immediately revoke the license of every insurance company in the State that removes a case to the Federal court.

"LEGAL QUESTIONS.

"The contention of the plaintiff in error, as shown by its petition below, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a Federal court, and under authority of which the Insurance Commissioner canceled its license, is repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

"The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

"Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

"Wherefore, he respectfully prays that this case be advanced and assigned for oral argument to as early a day upon the docket as may be practicable."

J. H. HAZELRIGG,
Counsel for Defendant in Error."

Witness the signature of the parties hereto.

THE TRAVELERS INSURANCE COMPANY,
OF HARTFORD, CONN.

By JOHN G. JOHNSON,
EDMUND F. TRABUE,
Counsel.

HENRY R. PREWITT,
Insurance Commissioner of Kentucky.

By JAMES H. HAZELRIGG,
Counsel.